

July 14 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 10-0176

JEFFERY ALLEN WEER,

Appellant,

-v-

STATE OF MONTANA,

Appellee.

**APPELLANT'S OPENING BRIEF ON APPEAL FROM THE
DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF MONTANA IN AND FOR THE COUNTY OF MISSOULA**

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ISSUES PRESENTED FOR REVIEW

1. Did the District Court commit an error of law when it concluded that the arresting officer had reasonable suspicion to stop and detain Mr. Weer.
2. Did the District Court abuse its discretion when it relied upon a non-cite case as the grounds for its decision?

STATEMENT OF THE CASE (Nature of the Case and Disposition Below)

On January 16, 2010, the State of Montana suspended Appellant Jeffery Weer's driver's license and driving privileges when he refused a preliminary breath test and intoxilyzer requested by Montana Highway Patrol officer Richard Salois. On February 2, 2010, Weer petitioned the Fourth Judicial District Court, Missoula County, to reinstate his driver's license. (C.R. 3.) The court below held an evidentiary hearing on February 12, 2010. Officer Salois testified. Mr. Weer introduced and the court below admitted a copy of the citation issued to him (Pet. Ex. 1, Tr. 5) and a copy of the video recording of his driving, taken by Officer Salois's in board camera. (Pet. Ex. 2, Tr. 7.) No other evidence was offered by either party.

Mr. Weer submitted a post-hearing brief and proposed findings of fact and conclusions of law. The State filed a response brief that added a

new claim: that the totality of the circumstances showed that Officer Salois had reasonable suspicion that Mr. Weer was driving under the influence, citing *Ditton v. Department of Justice*, 2008 MT 256N, 210 P.3d 701, as authority for its argument.

The District Court denied Mr. Weer's petition. Relying on *Ditton*, the non-cite case, Appx. 4, ¶ 6, the District Court, on March 10, 2010, concluded that "As the court did in *Ditton*, this Court should [sic] concludes that Trooper Salois had particularized suspicion to stop Weer." Appx. 4, ¶ 6.

Mr. Weer filed his Notice of Appeal on April 6, 2010.¹

STATEMENT OF FACTS

Montana Highway Patrol Officers Richard Salois and Elias Wolfe were patrolling the Milltown-Bonner stretch of Highway 12 on the night of January 15-16, 2010. Tr. 8:20. Wolfe had made a traffic stop between Milltown and Bonner at about 12:45 a.m. Salois was east of Wolfe, had made a u-turn, and was driving west towards him. As Salois approached

¹Mr. Weer was found guilty of Driving Under the Influence in Justice Court on May 20, 2010. He appealed from that conviction. His trial *de novo* is scheduled for September 14, 2010, in District Court.

Wolfe, an east-bound pickup was approaching in the opposite direction.

Ex. 2, 1:05 min.²

Salois elected to “track” the east-bound pickup. Tr. 8:21-22. And track him he did. After another u-turn, Salois drove at high speed to catch Weer. Ex. 2, 1:20 - 1:33. Coming on quickly, Salois closed with the pickup near the Bonner School. Less than a minute later the pickup's left tires touched the right hand stripe of the double center-line. The tires did not cross the double line nor did they encroach upon the unpainted space between them. See Fig. 1 (Screenshot of Ex. 2, 2:02 min.); Tr. 9:6-7; 12:16 - 13:1; 14:8:



Figure 1

²1 minute: 5 seconds on the video recording, using Windows Media Player.

After Officer Salois closed with the pickup, the pickup's tires moved two tire-widths to the left and back and one tire width to the left and back. This took place over a period of about 15 seconds. Up to that period, the pickup shows no left-right deviation at all. Portions of the center line were either unpainted or obscured by sanding operations. See Fig. 2 (Ex. 2, 1:46 - 1:57 min.):

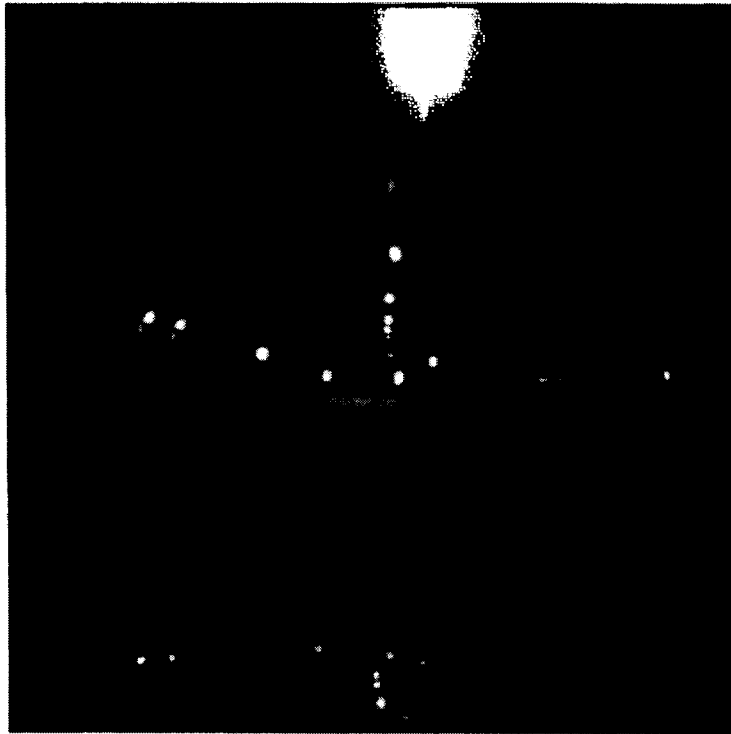


Figure 2

Officer Salois activated his overhead lights when the pickup's tires touched the center line. Tr. 9:18. He initiated the stop because he thought "you can't drive on the center line," Tr. 9:21-22, and having seen a

violation, he does not record further driving behavior because of the “potential problem” of a driver crashing. Tr. 11:15-20. He relied upon no other driving behavior to initiate the stop. Tr. 7:1-2; 14:13 - 15:1.

The pickup proved to be driven by Mr. Weer. Officer Salois informed the driver that he had stopped him because “I watched you cross over the center line, you were weaving in your lane of travel and you did it again.” Ex. 2, 3:06 min. Salois later admitted that the pickup did not cross over the centerline. Tr. 12:16 - 13:1; 14:7-8.

Officer Salois cited Weer for failing to drive to the right of the roadway. See Mont. Code Ann. § 61-8-321(1) (2009). Later, after conferring with the County Attorney's office, Salois concluded that he had committed a “clerical error” in writing the citation. Tr. 17:21 - 18:1. The State dismissed the “failing-to-drive-to-the-right” citation in Justice Court on May 20, 2010.

After conferring with the County Attorney's office, Officer Salois continued to claim that the stop was lawful because, according to Salois, touching the center line violated Driving on Divided Highways, Mont. Code Ann. § 61-8-330 (2009). Tr. 10:6-7.

STANDARDS OF REVIEW

This Court reviews a district court's ruling on a petition to reinstate a driver's license to determine if the conclusions of law are correct. *Brown v. State*, 2009 MT 64, ¶ 8, 349 Mont. 408, 203 P.3d 842. A district court's conclusions of law are reviewed de novo. *Supola v. Montana Dept. of Justice, Drivers License Bureau*, 278 Mont. 421, 423, 925 P.2d 480, 481 (1996). A district court's findings of fact are reviewed for clear error. *Brown*, ¶ 8. "A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if this Court is left with a definite and firm conviction that the District Court made a mistake." *In the Matter of J.M.W.E.H.* 1998 MT 18, ¶ 27, 287 Mont. 239, 954 P.2d 26.

Mixed questions of law and fact are also reviewed *de novo*. *State v. Brinson*, 2009 MT 200, ¶ 3, 351 Mont. 136, 210 P.3d 164. Issues that involve the application of controlling legal principles to undisputed factual circumstances are mixed questions of law and fact. *State v. Clark*, 2008 MT 317, ¶ 8, 346 Mont. 80, 193 P.3d 934.

A district court abuses its discretion if it acts "arbitrarily without employment of conscientious judgment or exceeded the bounds of reason

resulting in substantial injustice.” *Jarvenpaa v. Glacier Elec. Coop., Inc.*, 1998 MT 306, ¶ 13, 292 Mont. 118, 970 P.2d 84 (citation omitted).

ARGUMENT

I. SUMMARY OF ARGUMENT

Mont. Code Ann. § 61-8-330 applies to divided highways, that is highways that are divided into two roadways by medians, barriers, and flush medians. It does not apply to the double-yellow, no-passing, line. Therefore, when a driver’s tires touch the right hand stripe of a double center line, she does not violate Mont. Code Ann. § 61-8-330, “Driving on Divided Highways.” There are two reasons for this. First, under § 61-8-330, it is unlawful to drive over, across, or within the space delineated by two double yellow lines, cross-hatching, or barriers that establish a divided highway. Highway 200, where Mr. Weer was stopped, was not divided by two double yellow lines. Even if §61-8-330 applied to one double yellow line, a driver must encroach upon the space between the lines in order to violate the statute and Mr. Weer did not encroach on that space.

This Court has described and delineated driving behavior that is sufficiently erratic to justify a traffic stop to investigate for driving under

the influence of alcohol. Mr. Weer's driving behavior falls within the quantity and quality of driving behavior that this Court holds insufficient to warrant a traffic stop.

The District Court abused its discretion when it relied upon *Ditton v. Department of Justice*, 2008 MT 256N, 210 P.3d 701. *Ditton* fell under Section I, Paragraph 3(d)(v), Montana Supreme Court 1996 Internal Operating Rules, as amended in 2003. That rule provides that decisions like *Ditton* "shall not be cited or relied upon as authority in any litigation in any court in Montana." The State and the court below failed to adhere to this rule. The court below relied on *Ditton* as the grounds for its decision. Worse, *Ditton's* facts were readily distinguishable from the facts in Mr. Weer's case.

II. BASED ON THE TOTALITY OF THE CIRCUMSTANCES, A REASONABLE OFFICER WOULD NOT CONCLUDE THAT MR. WEER VIOLATED MONT. CODE ANN. § 61-8-330 (2009).

Officer Salois's *post hoc* justification for the stop, developed after he conferred with the County Attorney's office, was that Mr. Weer violated Mont. Code Ann. § 61-8-330 (2009), when his tires touched the right hand stripe of the center line. Section 61-8-330 is titled, "Driving on Divided

Highways.” Subsection (1) provides:

Where a highway has been divided into two or more roadways by leaving a space delineated by two double yellow lines or two yellow lines with a crosshatch pattern or by a physical barrier or a clearly indicated dividing section that is constructed in a way that impedes vehicular traffic, a vehicle may be driven only upon the right-hand roadway unless directed or permitted by official traffic control devices or police officers to use another roadway.

Section 61-8-330 does not apply to the double yellow line that divides a road into two lanes. This is apparent from its plain language. Under § 61-8-330, a highway is divided by:

- (a) **two** double yellow lines with a space between them;
- (b) two yellow lines with cross-hatching between them; or
- (c) physical barriers.

Mr. Weer’s tires touched the right stripe of a single double yellow line that had no cross-hatching; there were not two double-yellow lines. There was, of course, no barrier. (Had there been two double yellow lines—in other words, a total of four yellow lines, each pair enclosing a space—Mr. Weer could have violated the statute only if he had driven onto the space between them.)

Further support for this interpretation of § 61-8-330 is found in its reference to “two or more roadways.” In the hierarchy of Montana’s traffic

code, a highway may be a roadway or it may be divided into two or more roadways. A roadway may be divided into lanes. That portion of Highway 200 in Bonner, where Officer Salois made his observations, is a single roadway divided into lanes.

The “highway” encompasses everything—borrow pit, berm, shoulder, and roadway—within the right-of-way that is dedicated to public use. Mont. Code Ann. § 61-8-102(2)(g) (2009); *State v. Taylor*, 203 Mont. 284, 288, 661 P.2d 33, 35 (1983). A roadway is that “portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder.” Mont. Code Ann. § 61-1-101(60) (2009). In other words, in the case of Highway 200 in Bonner, the roadway is the paved portion of the highway.

The roadway may be divided into two or more lanes for vehicular traffic. Mont. Code Ann. § 61-8-328 (2009). Those lanes may be divided by double yellow lines that designate no-passing zones, *see* Mont. Code Ann. §§ 61-8-326(2) (referring to pavement striping designed to mark no-passing zones); -2-202; -203 (providing for Department of Transportation’s powers with respect to striping and signing); Montana Traffic Engineering Manual 19.1(4) (2007) (describing the double-yellow

line as delineating: “separation of lanes on which travel is in opposite directions, where overtaking [passing] is prohibited in both directions”). One may turn across the double yellow line to enter a parking lot, driveway, or private road, §§ 61-8-326(3); -328(4), as you can on that portion of Highway 200 where Mr. Weer’s tires touched the line.

A highway may include “two or more separate roadways.” Mont. Code Ann. § 61-1-101(60). In that instance, the two roadways will be divided by a space. The space may be a median, a barrier, a set of hash-marks (cross-hatching), or simply an expanse of pavement outlined by two double-yellow lines. Mont. Code Ann. § 61-8-330(1) (2009). In Bonner, where Mr. Weer was stopped, Officer Salois’s video shows two lanes divided by one double line.

This understanding of lane, roadway, highway, and divided highway is reflected in the Montana Department of Transportation’s usage. See Montana Traffic Engineering Manual § 19.2.4 (Nov. 2007), <http://www.mdt.mt.gov/other/traffic/external/pdf/Glossary.pdf> (accessed February 17, 2010) (describing “a median paved flush with the traffic lanes with double solid yellow lines applied adjacent to both sides of the median” as a flush median); Montana Traffic Engineering Manual G-4,

¶ 42 (defining a roadway as “the portion of a highway including shoulders” and a divided highway as having “two or more roadways”).

Highway 200 where Mr. Weer was stopped was not a divided highway—it was not two roadways divided by two double yellow lines—and Section 61-8-330 did not apply. A reasonable officer would not conclude that Mr. Weer had violated § 61-8-330. *Cf., United States v. Hernandez*, 55 F.3d 443, 445 (9th Cir. 1995) (holding that a reasonable Billings police officer would not have concluded that the defendant had violated Mont. Code Ann. § 61-8-353(1) as the arresting officer claimed).

Even if §61-8-330 applied here, Mr. Weer did not violate it. It is a violation to drive “over, across, or within a space, barrier, or section described in subsection (1).” Mont. Code Ann. § 61-8-330(2) (2009).

If Mr. Weer did not drive “over, across, or within a space, barrier, or section” delineated by two double yellow lines or two yellow lines with a crosshatch pattern or by a physical barrier or a clearly indicated dividing section that is constructed in a way that impedes vehicular traffic,” then he did not violate § 61-8-330. The facts are found in Officer Salois’s testimony. Mr. Weer drove onto the right hand line of the double yellow lines and did not encroach upon the space between them. Tr. 12:16 - 13:1.

This is confirmed by the video. See Fig. 1, above.

III. BASED ON THE TOTALITY OF THE CIRCUMSTANCES, A REASONABLE OFFICER WOULD NOT HAVE PARTICULARIZED SUSPICION THAT THE DRIVER OF THE PICKUP WAS DRIVING UNDER THE INFLUENCE.

Driving behavior that has the character of “erratic driving” can provide objective data to support a particularized suspicion that a driver is operating his vehicle under the influence of alcohol or drugs. *State v. Waite*, 2006 MT 216, ¶ 13, 143 P.3d 116, 333 Mont. 365. In this case, however, the driving behavior that Officer Salois observed falls within the class of driving behavior that this Court has held insufficient to justify a traffic stop. The contours of the rule are described in two cases.

In *State v. Lafferty*, 1998 MT 247, ¶ 15, 291 Mont. 157, 967 P.2d 363, the driver crossed the fog line once and drove onto it twice. This Court concluded, “While reasonable minds could differ over whether occasionally crossing the fog line is ‘normal’ or at least relatively common driving, not every ‘nonnormal’ kind of driving is necessarily indicative of driving under the influence of alcohol.” Although the prosecution described Lafferty’s driving “weaving,” as Salois did in this case, that did not constitute the sort of erratic driving that supports a traffic stop. *Lafferty* ¶ 16.

In *Morris v. State*, 2001 MT 13, 304 Mont. 114, 18 P.3d 1003, the vehicle drifted “a foot or so,” *Morris*, ¶ 10, across the dashed painted line separating two eastbound lanes of traffic, then drifted to the right and touched the fog line on the other side of the lane, and did so one or two times. *Morris*, ¶ 2. In light of those facts, this Court concluded, “the State failed to show that Morris was driving in a manner that justified a traffic stop.” *Morris*, ¶ 10.

Morris’s “weaving” was more exaggerated than Weer’s movement. Mr. Weer did not weave from the other side of the center line to the outside of the fog line, as Morris did. Unlike Lafferty and Morris, Weer crossed neither the center line, as Morris did, nor the fog line, as both Lafferty and Morris did. If Lafferty’s and Morris’s driving was not sufficiently erratic to justify a traffic stop, Weer’s driving was less so.

This brings us to one more matter, which is Officer Salois’s later articulated concern of the “potential problem” that Weer’s vehicle might cross into the opposing lane of traffic. This issue is addressed by *State v. Reynolds*, 272 Mont. 46, 899 P.2d 540 (1995). There, the evidence that the driver was “bordering on traveling too fast,” *Reynolds*, 272 Mont. at 48, 899 P.2d at 542, did not support a particularized suspicion that the

motorist was about to commit an offense.

In Weer's case, Officer Salois's claim was equally speculative. Weer's vehicle had not crossed into the oncoming lane of travel during Salois's observation of him. Traffic was so light that Salois did not hesitate to have Weer walk the fog line as part of the battery of SFSTs. We cannot say, in light of that evidence, that Weer's vehicle was even "bordering on" crossing into the opposing lane of traffic.

In light of the standards set forth in *Lafferty* and *Morris*, Officer Salois lacked particularized suspicion to stop Mr. Weer's vehicle.

IV. THE COURT BELOW ABUSED ITS DISCRETION WHEN IT RELIED UPON A NON-CITEABLE DECISION OF THIS COURT.

How, in light of these facts, did the court below conclude that there was particularized suspicion that Weer had committed or was about to commit an offense? It relied upon a non-citeable case.

In its post-trial brief, the State argued, "In a case similar to the one before this Court the Montana Supreme Court upheld the conclusion of the District Court that an officer . . . had particularized suspicion to initiate a traffic stop. *Ditton v. Department of Justice Motor Vehicles Div. State*, 2008 MT 256N, ¶ 8, 210 P.3d 701 (Table) (2008)." C.R. 9, at 4. The court

below concluded that even if Officer Salois wrote the wrong citation, “As the court did in Ditton, this Court should [sic] concludes that Trooper Salois had particularized suspicion to stop Weer.” Appx. at 4, ¶ 6.

Ditton said expressly, “Pursuant to Section I, Paragraph 3(d)(v), Montana Supreme Court 1996 Internal Operating Rules, as amended in 2003, the following memorandum decision shall not be cited as precedent.” *Ditton*, ¶ 1. Ironically, the officer’s observations in *Ditton* were quantitatively and qualitatively greater than those in Mr. Weer’s case. The officer in *Ditton* observed the defendant parked at an unusual angle in a bar’s parking lot, crossing the fog-line, weaving, crossing both double-yellow lines, missing a turn for which he signaled, and then driving partially off the roadway. *Ditton* at ¶ 3.

It was an abuse of discretion to rely on *Ditton*. *Jarvenpaa*, above.

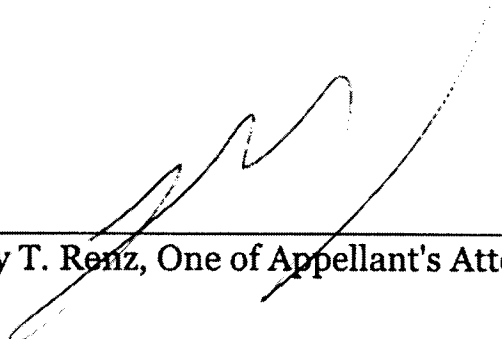
CONCLUSION

For the foregoing reasons, the Order and Judgment of the court below should be reversed with instructions to enter judgment for the Appellant and Petitioner, Jeffery Allen Weer.

RULE 11(4)(d) CERTIFICATE

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Georgia text typeface of 14 points with Headings in Arial, 14 point text; is double spaced; and the word count calculated by Wordperfect X4 is not more than 10,000 words, excluding those components listed in Rule 11(4)(c), Mont. R. App. P.

DATED this 13th day of July, 2010



Jeffrey T. Renz, One of Appellant's Attorneys

CERTIFICATE OF SERVICE

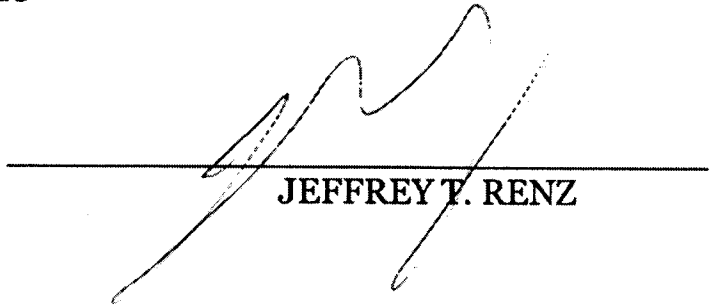
I hereby certify that I served true and accurate copies of the foregoing Opening Brief by depositing said copies into the U.S. Postal Service, postage prepaid, addressed to the following:

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DATED: July 13, 2010



JEFFREY T. RENZ

APPENDIX

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